

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA,
Complainant,

vs.

PPJV INC., d/b/a PUBLISHERS PRESS,
Respondent.

8 U.S.C. §1324a
PROCEEDING

OCAHO CASE
No. 90100306

ORDER GRANTING IN PART AND DENYING IN
PART COMPLAINANT'S MOTION FOR SUMMARY DECISION

PROCEDURAL HISTORY

On October 9, 1990¹, United States of America, Immigration and Naturalization Service (INS) filed a Complaint Regarding Unlawful Employment against Respondent PPJV, Inc. d/b/a Publisher's Press. Said Complaint alleges Respondent violated the Immigration Reform and Control Act of 1986 (IRCA) in five separate counts.

Complaint's Count 1 alleges Respondent violated IRCA by hiring Ricardo Madrigal Navia after November 6, 1986, knowing this individual was not eligible to work in the United States. Alternatively, this count alleges Respondent continued to employ Navia after learning he was not eligible for employment in United States.

In Count 2, Complainant alleges Respondent failed to complete employment eligibility verification forms (Form I-9) for three employees in violation of 8 U.S.C. §1324a(a)(1)(B). Count 3 alleges Respondent violated IRCA by neglecting to ensure seven employees properly completed Form I-9. Count 4 charges that Respondent failed to properly complete part two of one Form I-9. Count 5 alleges Respondent violated IRCA by failing to reverify the employment eligibility of three employees after the expiration of their previously valid eligibility documents.

Respondent filed an Answer to the Complaint on October 19 denying all substantive allegations advanced by the Complaint.

¹ Unless shown otherwise, all dates refer to the 1990 calendar year.

On January 2, 1991, Complainant filed the instant Motion for Summary Decision. Respondent opposed said Motion by filing a Brief with this tribunal on February 4, 1991, even though it was in the midst of obtaining information from the Complainant through discovery. In view of the incomplete nature of the discovery process, Respondent was granted an opportunity to file a supplementary opposition brief. On March 11, 1991, Respondent timely filed its Supplementary Brief. Complainant, in turn, filed a Reply to Respondent's Briefs on March 18, 1991.

STATEMENT OF UNDISPUTED FACTS

On January 30, pursuant to a prior Notice of Inspection, INS Investigative Assistant Ernest A. Flores conducted a compliance audit of the I-9 forms in Respondent's possession. The January 30 inspection revealed a number of alleged IRCA paperwork violations. These alleged violations have been set forth as counts 2 through 5 of the Complaint.

On February 6, Flores was informed by the Social Security Administration that the Social Security number provided by Navia, Respondent's production foreman, was invalid as to that individual. On the following day, INS instituted deportation proceedings against Navia. On April 13, Flores personally served Respondent with a letter dated April 10 and signed by Robert L. Ackerman, Officer in Charge of the San Jose, California INS office. The letter informed Respondent that Navia had provided insufficient evidence of employment eligibility based on the invalid Social Security number. The letter further informed Respondent that it should promptly obtain further proof of employment eligibility from Navia.

Respondent admits that it continued to employ Mr. Navia after April 13. However, Respondent claims that it attempted to determine Navia's employment eligibility by obtaining information from Navia's attorney, by contacting U.S. Representative Tom Campbell's office, and by attempting to verify Flores' conclusion that Navia could not be lawfully employed with Flores' supervisor. On May 22, the INS granted Navia temporary employment eligibility. Therefore, Complainant alleges Respondent knowingly hired, or in the alternative, continued to employ, Navia in violation of 8 U.S.C. §§1324a(a)(1)(A), (a)(2) between April 14, and May 21.

STANDARDS APPLICABLE IN SUMMARY DECISION PROCEEDINGS

The Rules of Practice and Procedure (Rules) promulgated for employer sanction proceedings [28 C.F.R. §68 et seq] provide for the issuance of summary decision where no genuine issues of material fact exist and it appears that a party is entitled to summary relief. See 28 C.F.R. §68.36 (c) (1990). The summary

adjudication mechanism is intended to conserve resources by dispensing with the need for a hearing where the parties no longer retain any genuine disputes with respect to "material" facts. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The United States Supreme Court has defined a fact to be "material" if it can potentially influence the outcome of a case. See Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

In view of the policies underlying the summary decision process, and in consideration of possible prejudicial effects which may result from an adjudication without a hearing, courts have allocated the initial burden of proof in summary decision cases on the moving party. Therefore, the party seeking summary decision assumes the initial duty to demonstrate the absence of any issues of material fact. See Richards v. Neilsen Freight Lines, 810 F.2d 898 (9th Cir. 1987). Any ambiguities in the evidence as well as all reasonable factual inferences are resolved in favor of the nonmoving party. See Harbor Ins. Co. v. Trammell Cros Co., Inc., 854 F.2d 94 (5th Cir. 1988), cert. denied 109 S.Ct. 1315, 103 L.Ed.2d 584. If the moving party meets its initial evidentiary burden, the nonmoving party then must come forward with facts which demonstrate the existence of genuine factual issues. However, the nonmoving party cannot rely upon mere conclusory assertions to demonstrate the existence of factual issues. See Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydroelec., 854 F.2d 1538 (9th Cir. 1988).

Complainant's Motion for Summary Decision is examined in light of the aforementioned legal standards.

THE PARTIES' FACTUAL SHOWINGS

COUNT ONE

The Knowing Hire Allegation

Complainant asserts that Respondent violated IRCA by hiring Navia even though it knew he was not eligible to work in the United States. But Complainant's evidence clearly shows that it is not entitled to a favorable summary decision on this claim.

The statutory language of 8 U.S.C. §1324a(a)(1)(A) provides that an employer has unlawfully hired an unauthorized alien only if it knew of the alien's eligibility status at the time of hire. An employer's "knowledge at the time of hire" is therefore a crucial element of proof for the establishment of a "knowing hire" violation.

Complainant argues Respondent possessed the requisite degree of knowledge which is necessary for a finding of "knowing hire"

violation at the time it first hired Navia. Complainant relies on Flores' declarations to support this contention. Flores' declarations assert Respondent admitted that it "knew" Navia was not eligible for employment in the United States. However, a reading of said declarations plainly reveal that none of the purported statements made by Respondent related to the state of its knowledge at the time it hired Navia. At most, the alleged admissions only serve to show Respondent became aware of a difficulty with Navia's status after it was informed of that fact by the INS on April 13. This was more than two years after Navia was hired.

As Complainant has not presented any other evidence relating to Respondent's knowledge at the time it hired Navia, a factual issue remains with regard to this portion of Count 1. Additionally, Complainant's own evidence demonstrates that Respondent completed Form I-9 for Navia and that it examined facially genuine employment eligibility documents presented by Navia. This may constitute a complete defense to the charge of "knowing hire". See 8 U.S.C. §1324a(a)(3). For these reasons, summary decision in favor of Complainant as to the knowing hire allegation is denied.

The Continuing To Employ Alternative Allegation

Complainant is similarly not entitled to summary decision on its "continuing to employ" allegation.

Respondent admits that it hired Navia for employment in the United States after November 6, 1986. In addition, Respondent also admits that it continued to employ Navia after the INS' April 13 notice regarding Navia's possible unauthorized status. Hence, the only remaining liability element which must be shown by the Complainant is whether Respondent continued to employ Navia after acquiring knowledge of his unauthorized status. See 8 U.S.C. §1324a(a)(2). An examination of the available evidence reveals Complainant has failed to demonstrate the absence of disputed material facts on this issue.

Complainant asserts Respondent acquired knowledge of Navia's unauthorized status after April 13. However, Complainant's evidence for this assertion consists of the aforementioned declarations by Mr. Flores and the April 13th Ackerman letter.

In a nutshell, Complainant argues that Ackerman's letter is functionally equivalent to the INS letter provided to the employer in New El Rey Sausage case² and that Respondent's failure to reverify Navia's employment eligibility by requiring the production

² New El Rey Sausage Co. v. I.N.S., No. 89-70349 (9th Cir. filed Feb. 7, 1991).

of a proper eligibility document rendered it liable for the "continuing to employ" allegation in Count 1. I am not satisfied on the basis of the declarations before me that this matter approaches the circumstances in that case.

Even assuming that Ackerman's letter can be construed as being the forthright warning found in the New El Rev INS letter, Respondent's president, William Johnson, has made averments here which are in stark contrast to the post-letter employer conduct in that case. Thus, in New El Rev the employer, having notice that the employment documents were fraudulent, merely sought verbal assurance from the employees involved that the documents were genuine and failed to do anything to obtain corroboration for the self-serving affirmance received. In effect, the Ninth Circuit held that the employer's failure there "to investigate suspicious circumstances imputes" the requisite knowledge under IRCA's continuing to employ provision.

Here, Johnson avers that he promptly set out the day after receiving Ackerman's letter to obtain the requisite reverification and was immediately confronted with a complex web of conflicting actions, opinions, regulations, and agency practices which bore on Navia's employment eligibility. Thus, according to Johnson's declaration, Navia promptly referred Johnson to an attorney retained for an INS proceeding in progress. The attorney asserted to Johnson that Navia could be lawfully employed. Shortly thereafter, INS agent Flores asserted to Johnson that Navia could not be lawfully employed but, according to Johnson, Flores claimed to be ignorant of Navia's pending INS proceeding and could not satisfactorily explain his adamant position. Thereafter, Johnson sought advice from an immigration specialist at his local congressman's office and received some positive assurance concerning Navia's status. Thereafter, Flores again asserted that Navia could not be lawfully employed³ and Johnson then made unsuccessful attempts to reach Flores' superior for a detailed explanation of the position taken by Flores. Whatever the impact such facts may have, if ultimately found to be true, on the outcome of this case, it can be said that they demonstrate a scenario which is in stark contrast to that found in New El Rev.

Complainant argues that Johnson's averments are a mere "smoke screen" to mask Respondent's true motive for its failure to obtain documentation necessary to establish Navia's employment eligibility. Instead, Complainant argues that Johnson was interested solely in continuing to employ an unauthorized alien because that individual was an important employee within Respondent's operation.

³ Flores and Johnson discussed Navia's status on April 20 and May 15. Their respective accounts of these exchanges vary substantially.

Although Complainant's argument may ultimately prevail, the argument itself implies the existence of disputed material facts in this case. Moreover, in view of the Ninth Circuit's observation in the New El Rev case that "a rule requiring immediate suspension or termination (of an unauthorized alien) is problematic," assertions being advanced by Respondent cannot be deemed immaterial.

For the foregoing reasons, I deny Complainant's motion as to Count 1.

Respondent argues that it is entitled to summary decision on Count 1 because Navia had temporary employment authorization during the relevant period due to the application of INS' regulations. Respondent claims Navia filed for legal status under family unification provisions on January 25, and that INS has failed to act on his application within sixty days. Therefore, Respondent claims Navia was entitled to temporary work eligibility status under 8 C.F.R. §274a.a13(d).

Complainant claims the INS never "received" the application because INS returned the application to Navia with instructions that he should file under the amnesty provisions; hence it was not obligated to "act" on the application. Complainant also asserts that Navia did not refile for legal status until May 18, and that the INS granted him temporary status within four days of the receipt of that application.

The evidence clearly demonstrate there is a dispute between the parties regarding whether the INS has "received" Navia's application in January. Absent additional evidence, Respondent is therefore not entitled to a favorable summary decision with respect to Count 1.

COUNT TWO

Count 2 of the Complaint alleges Respondent has failed to prepare and retain I-9 forms for three of its former employees.

Respondent admits it has failed to retain I-9s for the three named employees. However, it claims that no I-9s were kept for these individuals because they failed to present eligibility documents despite Respondent's repeated attempts to examine those documents. Respondent claims that its difficulties in obtaining eligibility documents from the three former employees arise from the fact that they worked on the night shift while the person responsible for filling out I-9s worked on the day shift. Respondent further contend that these employees were eventually terminated as a result of their failure to present eligibility documents.

On the other hand, Complainant has produced evidence which reveals the three relevant employees were each employed for more

than three days by the Respondent before their terminations.

Federal regulations require employers to complete I-9 forms for their employees within three days after hire. See 8 C.F.R. §274a.2(b)(1)(ii) (1990). Failure to comply with the regulations constitutes an IRCA paperwork violation. See 8 U.S.C. §1324a(b). Complainant's evidence clearly establish Respondent has violated IRCA by failing to timely complete I-9s for these three employees.

Moreover, Respondent's excuse regarding the difficulty of I-9 completions and its contention that it eventually fired the employees are not defenses against IRCA liability. The IRCA paperwork requirements are designed to prevent the hiring of unauthorized aliens. Respondent's failure to comply with the plain terms of the requirements thereby undermine this goal of IRCA.

Respondent also pleads several affirmative defenses with respect to Count 2's charges.

As a first affirmative defense, Respondent claims the pendency of the knowing hire/continuing employment allegations contained in Count 1 prevents the proper adjudication of the penalty amount for Count 2; hence the summary adjudication of Respondent's liability for Count 2 is not appropriate at this time.

This claim is without merit. While it is true that the penalty for the instant paperwork violations may depend upon the outcome in Count 1, this does not thereby prevent the summary adjudication of the liability issues. Liability for Count 2 may be summarily disposed of at present while the penalty determination may be delayed until after the adjudication of Respondent's liability for Count 1 of the Complaint.

Respondent has also alleged what appears to be the affirmative defense of "vindictive prosecution". "Vindictive prosecution" is a liability defense Respondents may employ to combat constitutional due process violations by the prosecuting government entities. This defense contains two essential elements of proof. The Respondent must first show similarly situated persons were not prosecuted for similarly severe violations. It must next demonstrate that the INS' actions in this case are based upon an improper motive. See United States v. Aguilar, 871 F.2d 1436, 1474 (9th Cir. 1989); see also United States v. Napue, 834 F.2d 1311, 1329-1330 (7th Cir. 1987).

Regardless of whether Respondent has presented sufficient evidence of INS' improper motive for purposes of defeating the present summary decision motion, it is clear that it has failed to present any evidence regarding the first element of "vindictive prosecution". In fact, Respondent never even alleged the disparate treatment prong of the "vindictive prosecution" defense. Moreover, despite receiving approximately ninety pages of discovery materials

from the government, Respondent still could not present any evidence of disparate treatment. Hence, there exist no genuine disputed issues regarding Respondent's "vindictive prosecution" claim. This defense cannot prevent this tribunal from issuing a summary decision as to Count 2 of the Complaint.

Finally, Respondent has advanced the additional defense of "substantial compliance". In IRCA cases, "substantial compliance" may constitute an affirmative defense. "Substantial compliance" is defined as actual compliance with the substance essential to every reasonable objective of the statute. See U.S. v. Citizens Utilities., Inc., OCAHO Case No. 89100211, April 27, 1990 (Decision and Order Denying Respondent's Motion for Partial Summary Decision and Granting Complainant's Motion for Partial Summary Decision). Failure to complete I-9s however, cannot constitute actual compliance with every reasonable objectives of IRCA. IRCA instituted the I-9 paperwork requirements in order to ensure that no unauthorized aliens will be employed in the United States. Failure to complete I-9s within the specified time frames presumably makes it more likely for such aliens to obtain employment in the United States. Hence, "substantial compliance" is not a defense to Count 2 of the Complaint.

In view of the above discussions, I must find Respondent has violated 8 U.S.C. §1324a(a)(1)(B), (b) by failing to complete I-9s for three of its former employees as alleged in Count 2.

COUNT THREE

Complainant alleges in Count 3 that Respondent failed to ensure the proper completion of seven I-9s. Specifically, part one of the seven forms were not properly completed by each of the seven relevant employees.

Complainant presents the photocopies of the seven I-9s as evidence in support of its allegations. Respondent admits the photocopies are accurate reproductions of the original forms. It further admits the I-9s were completed in an improper manner. However, Respondent claims the forms exhibit only minor clerical errors and that they demonstrate it has in fact complied with IRCA in good faith. Respondent also advances the defense of substantial compliance with respect to this count.

Respondent's good faith is a factor which must be considered for penalty determination purposes. See 8 U.S.C. §1324a(e)(5). But it is not an affirmative defense to substantive liability under IRCA. See United States v. Don Moyle, Owner d/b/a Moyle Mink Farm and Springdale Pelt Processing, OCAHO Case No. 89100285, August 22, 1989 (Order Granting Complainant's Motion to Strike Affirmative Defenses). Hence, the "good faith compliance" claim does not serve as an obstacle to the issuance of summary decision on Count 3.

An examination of Complainant's evidence shows that four of the seven I-9s are clearly defective. The forms for foreman Navia, Jimmy Ramos, Rafael Serrano, and Javier Tienda reveal those four employees neglected to attest to their status in part one of the I-9s. The attestation defects demonstrate the lack of actual compliance with every reasonable goals of IRCA: employee attestation is intended to ensure the individuals hired by the employer will truthfully reveal their status which can serve as an important indicator of their employment eligibility. Employees' failure to attest to their status in part one of the I-9 thus increase the likelihood of prohibited employment. Consequently, with respect to these four I-9s, Respondent has not substantially complied with the paperwork requirements. I find, therefore, that Respondent has violated IRCA as to these four employees.

In the remaining three instances of violations alleged in Count 3, Respondent may have a "substantial compliance" defense. The photocopies of the I-9s for Ignacia G. Ivoa (Iboa), Maria E. Lemus, and Jose L. Navia indicate that each of these three employees have attested to their status in part one of their I-9s. Ivoa, Lemus and Navia have all attested that they are aliens lawfully admitted for permanent residence in the United States; however, they neglected to place their alien numbers in the appropriate boxes. But, in part two of these three I-9s, Respondent did not employ the employees' alien registration card (a list A document) to verify employment eligibility. Rather, in each case, Respondent employed the employees' California driver licenses (a list B document) and their social security cards (a list C document) to properly verify their work eligibility.

While it is true that the INS' Handbook for Employers require employees to fill in their alien numbers in part one of their I-9s once they have indicated they are permanent residents, there is some question as to whether this requirement is superfluous. No comparable requirement exists for United States citizens.

Presumably, employees would have their alien numbers readily available only if they have their alien registration cards on their persons during the verification procedure. If that is the case, Respondent could have verified work eligibility by merely filling in the employees' alien registration card numbers in part two of the forms as list A documents. The fact that Respondent may verify eligibility without using the employees' alien registration cards implies that employers retain no duty to obtain permanent resident employees' alien numbers during the I-9 verification process. This implication contradicts Complainant's present attempt to hold Respondent liable for failing to ensure the three employees have provided their alien numbers in part one of the forms. This apparent contradiction between the present allegations and the policy manifested by part two of the I-9 form consequently bring into question the purpose for requiring employees' to provide their alien numbers when they have already provided sufficient documents

for employers to properly verify their employment eligibility and have truthfully attested to their status.

Although there may exist a reasonable purpose for permanent residents to provide their alien numbers in part one, where it is not used to establish eligibility, while U.S. citizens are not required to provide any comparable information, Complainant has failed to provide any justifications on this issue. Thus, there appears to exist genuine issues of material fact regarding whether Respondent has substantially complied with IRCA by fulfilling every reasonable objectives of that statute as to these three employees.

For these reasons, I find there exist material issues on the "substantial compliance" defense in Count 3 of the Complaint as to Ignacia G. Ivoa, Maria E. Lemus, and Jose L. Navia and summary decision is inappropriate with respect to the I-9s for these three employees. Complainant's motion is granted as to the remaining allegations contained in Count 3.

COUNT FOUR

In Count 4, Complainant alleges Respondent failed to properly complete part two of one I-9. Complainant has attached a photocopy of the original I-9 which Respondent has admitted to be an accurate reproduction.

The photocopy clearly indicates Respondent has failed to enter the document identification number for the employee's certificate of U.S. citizenship. Absent this information, Respondent has not properly verified the employment eligibility of this individual. Therefore, the substantial compliance defense is not applicable here.

In view of Respondent's prior admissions and the apparent nature of the instant violation, I grant Complainant's motion with respect to Count 4.

COUNT FIVE

This count charges Respondent with the failure to reverify the employment eligibility of three employees after the expiration of their respective eligibility documents.

Employers have a duty to reverify employees' work eligibility if their eligibility documents contain an expiration date. This is to ensure that employers do not continue to employ an alien after the termination of his or her work eligibility. See Mester Mfg. Co. v. I.N.S., 879 F.2d 561, 568 (9th Cir. 1989).

In two of the three instances, the expiration dates of the work eligibility documents were clearly indicated by Respondent on the employees' I-9s. However, there does not exist any evidence

tending to indicate Respondent has completed new I-9s for these employees after the indicated dates. Furthermore, Respondent does not deny that it has failed to reverify those employees' employment eligibility; it only argues there is no violations here because there exist sufficient other documents to establish employment eligibility of the employees.

Respondent's argument is without merit as a result of discussions contained in the following paragraphs. In any case, the validity of the I-9 for Alejandrina Ocesuera was entirely based upon the expired List A document (it contained only one List B document when two are in fact necessary). Therefore, no genuine issues of material fact exists as to the Respondent's liability for failing to reverify the work eligibility of Urbano G. Ivoa and Alejandrina Ocesuera.

In the remaining instance, it is alleged that Respondent has failed to reverify the employment eligibility of Carlos Jimenez. Complainant's allegation in this case is premised on the fact that Jimenez has indicated an alien number in part one of the form which attests to the fact that he is an alien authorized by the INS to work in the United States. Jimenez failed, however, to indicate an expiration date for his employment authorization. Nevertheless, Respondent made a copy of Jimenez' employment authorization card which contained an expiration date of October 7, 1989. Respondent, however, did not use Jimenez's employment authorization card in part two of the I-9 for verify his work eligibility; instead, Respondent used Jimenez's driver's license and social security card for verification purposes.

Respondent argues that it did not retain any reverification duty after the expiration date printed on Jimenez's authorization card because that document was not used to verify Jimenez's work eligibility. Complainant, on the other hand, argues that the INS' Handbook for employer specifically instructs employers to reverify the work eligibility of those employees whose documents carry expiration dates; hence Respondent has violated IRCA.

In this case, Respondent copied Jimenez's employment authorization card which clearly indicates an expiration date. Even if this document is superfluous for verification purposes, Respondent has a reverification duty. This duty is promulgated to help achieve IRCA's primary goal to prevent the employment of unauthorized aliens in the United States by requiring employers to assume the burden of verification. In consideration of this policy, the manner in which an employer obtains knowledge that its employee's work eligibility is about to expire is immaterial; so long the employer has such knowledge, it assumes a duty to verify eligibility. See New El Rey Sausage Co., Inc. v. I.N.S., No. 89-70349, slip op. at 1654 n.7 (9th Cir. Feb. 7, 1991).

Respondent does not deny that it has actual knowledge

regarding the expiration of Jimenez's work eligibility. In any case, since it admits that it has copied Jimenez's Employment Authorization card, Respondent undoubtedly has constructive knowledge of its expiration date. Therefore, Respondent has violated IRCA by failing to reverify the employment eligibility of Carlos Jimenez after the expiration of his previous employment authorization card. Complainant's motion is granted as to Count 5.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence provided by the parties, I conclude:

1. That no genuine issues of material fact exist as to the allegations contained in Count 3 of the Complaint with respect to four employees. Therefore, I find Respondent violated 8 U.S.C. §1324a(a)(1)(B) by failing to properly complete employment eligibility verification forms for the following four employees:

- A. Ricardo M. Navia
- B. Jimmy Ramos
- C. Rafael Serrano
- D. Javier Tienda

2. That no genuine issues of material fact exist as to the allegations contained in Counts 2, 4 and 5 of the Complaint. Hence I find that Respondent violated 8 U.S.C. §1324a(a)(1)(B) by failing to prepare employment eligibility verification forms for three employees, by failing to properly complete such form for one employee, and by failing to reverify the employment eligibility for an additional three employees. These seven employees are:

- E. Enedina Fierros
- F. Jose A. Gonzalez
- G. Maria Lobato
- H. Michael Rogers
- I. Urbano Ivoa
- J. Carlos Jimenez
- K. Alejandrina Ocesuera

3. That Complainant is not entitled to summary decision as a matter of law with respect to the remaining allegations contained in the Complaint. Specifically, there exist genuine issues of material fact as to the allegations pertaining to Ricardo M. Navia contained in Count 1 and those regarding Ignacia Ivoa, Maria E. Lemus, and Jose L. Navia contained in Count 3.

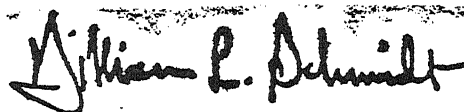
4. That the civil money penalty amount is not a proper subject for summary adjudication at this time due to the existence of unresolved liability allegations. The determination of these pending allegations may affect the penalty determination.

ACCORDINGLY, IT IS HEREBY ORDERED:

That Complainant's Motion for Summary Decision is granted in part and denied in part as provided above.

IT IS FURTHER ORDERED that the hearing in this matter be held on July 9, 1991, and consecutive days thereafter until concluded, at a time and place in or about San Jose, California to be announced later.

DATED: June 4, 1991



William L. Schmidt
~~Administrative Law Judge~~
901 Market St., Suite 300
San Francisco, CA 94103
(415) 744-7896 (FTS) 484-7896